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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, ET AL.,

*Petitioners,*

*v.*

DANIEL WEISMAN, ETC.,

*Respondent.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR NATIONAL PEARL (NATIONAL EDUCATION ASSOCIATION, NATIONAL PTA, ET AL.) AND THE NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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American Association of School Administrators
American Association of University Women
American Humanist Association
Central Conference of American Rabbis
Committee for Public Education and Religious Liberty*
Council for Democratic and Secular Humanism
Michigan Council about Parochiaid
Monroe County, NY PEARL
National Center for Science Education, Inc.
National PTA
National Council of Jewish Women
National Education Association
National Service Conference of the American Ethical Union
Ohio PEARL
Public Funds for Public Schools of New Jersey
Union of American Hebrew Congregations
Unitarian Universalist Association of Congregations

* SEE INSIDE BACK COVER FOR LIST OF MEMBER ORGANIZATIONS

Question Presented:

Whether the Establishment Clause permits public schools to sponsor religious exercises?

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## INTEREST OF THE AMICI CURIAE

The National Coalition for Public Education and Religious Liberty ("National PEARL") comprises organizations sharing the objectives of preserving religious freedom and separation of church and state in education. The National Association of Elementary School Principals is a voluntary professional organization of more than 25,000 elementary and middle school principals. Its members are responsible for the education of approximately 25 million students.

## SUMMARY OF THE ARGUMENT

Ignoring the warning that ours is a "government of laws, and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), the Solicitor General and Petitioners ask this Court to interpret the Establishment Clause as having endorsed the *practices* of the Founders' generation. Not only is such an approach to constitutional interpretation inconsistent with the Founders' intent, its proposed application to this case relies on selectively chosen examples that cannot be reconciled with principled constitutional adjudication.

Compounding these methodological errors, Petitioners and the Solicitor General then ask this Court to interpret the Establishment Clause as forbidding only state "coercion," a term they never define. They assert that coercion -- the most *flagrant* form of religious persecution -- should be the *only* possible violation of the Establishment Clause. History, upon which Petitioners and the Solicitor General professedly rely, does not support this peculiar interpretation of the Establishment Clause.

This Court should, consistently with all of its prior decisions, affirm the lower courts and strike down religious exercises sponsored by public schools.

## ARGUMENT

### I. THE ESTABLISHMENT CLAUSE SHOULD BE INTERPRETED BY REFERENCE TO CONSTITUTIONAL PRINCIPLES, NOT TO SELECTED HISTORICAL PRACTICES.

#### A. The Founders Believed that the Constitution Should Be Interpreted by Reference to Principles and Not By Reference to Practices.

In arguing that constitutional *rights* should be interpreted in light of the *practices* of the Founders' generation,[1] Petitioners and the Solicitor General ask this Court to resuscitate the same discredited method of constitutional interpretation that was employed in the *Dred Scott* decision to legitimize human slavery.[2] Such a method of interpretation is justified neither by history nor by logic.

Writing for the Court in *Dred Scott*, Chief Justice Taney dismissed the argument that Blacks were included within the phrase "all men are created equal" *because*

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[1]*See, e.g.*, Brief for the United States as Amicus Curiae (hereinafter "SG Br.") at 7 ("A proper theory of the Establishment Clause must therefore embrace the validity of this practice [of devotional exercises] and its modern counterparts rather than treating them as anomalies"). Similarly, from the premise that "[t]he Founders encouraged civic recognition of the Nation's religious heritage," it is concluded that such practices "therefore did not implicate the prohibition embodied in the Establishment Clause." *Id.* at 9. *See also id.* at 18-19. Brief for Petitioners (hereinafter "Pet. Br.") at 26-30 (setting out "The Conduct of the Founders"); *id.* at 31 ("this conduct of the Founders reflected their intentions concerning the Establishment Clause . . . .").

[2]*Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).



> if the language, as understood in that day, would embrace them, the *conduct* of the distinguished men who framed the Declaration of Independence *would have been utterly and flagrantly inconsistent with the principles they asserted.*

*Scott v. Sanford*, 60 U.S. at 410 (emphasis added). Finding it inconceivable that the men who founded our nation could have acted inconsistently with their own principles, the *Dred Scott* Court looked to the conduct of the Founders' generation to divine the meaning of the law.

> [T]he men who framed this declaration were great men -- high in literary acquirements -- high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.

*Id.* Thus, in the curious reasoning of the *Dred Scott* decision, "negroes" are not "men" within the phrase "all men are created equal" *because* the "great men" who ratified that phrase were slaveholders. For the *Dred Scott* Court it was easier to deny the humanity of Blacks than to contemplate the possibility that the Founders failed to adhere to their own principles.

The briefs of Petitioners and the Solicitor General now adopt the *Dred Scott* interpretive methodology -- interpreting fundamental law by reference to the Founders' practices -- to justify state-sponsored devotional activities at public schools. They do not envision the possibility that the actions of the Founders could have been inconsistent with the principles of the

Constitution.[3] But they do not offer *any* evidence that *any* Founder believed that the Constitution should be interpreted by looking to the conduct of the Founders' generation.

The Founders fully recognized that conduct was an unreliable measure of principle. John Jay, the first Chief Justice of the United States and co-author of the *Federalist*, candidly admitted the shortfalls of his contemporaries' conduct. Writing in the month that the Constitution was ratified, Jay acknowledged that many of the principles of his generation were "more generally admitted in theory than observed in practice."[4] Jay believed, for example, that slavery was a violation of the fundamental law of his country and of the rights of his fellow human beings. Writing in 1819, Jay admitted that slavery was "discordan[t] with the principles of the Revolution; and [was] repugnant to the . . . Declaration of Independence. . . ."[5] Chief Justice Jay observed that his contemporaries acted inconsistently with these fundamental principles:

> That Men should pray and fight for their own Freedom and yet keep others in Slavery is

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[3]The Solicitor General declares that it would be "modern-day arrogance in the extreme" to suggest that there may have been a disparity between the Founders' conduct and their political principles. SG Br. at 12. As will be shown below, the Founders themselves recognized the difference between their own principles and practices. Thus it becomes modern-day naivete in the extreme to believe that there could not have been a disparity between the Founders' principles and their practices.

[4]Letter from John Jay to the English Antislavery Society (June 1788), *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 340 (H. Johnston ed. 1890-93).

[5]Letter from John Jay to Elias Boudinot (Nov. 17, 1819), *reprinted in* 4 *id.* at 431.



> certainly acting a very inconsistent as well as unjust and perhaps impious part, but the History of Mankind is filled with Instances of human Improprieties.[6]

Thus what Chief Justice Jay labeled the Founders' "improprieties," modern-day litigators euphemistically describe as the Founders' "practices."[7]

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[6]Letter from John Jay to Richard Price (Sept. 27, 1785), *reprinted in* 3 *id.* at 168.

[7]During the Constitutional Convention in Philadelphia, delegates similarly were made aware of the inconsistency between the principles of the Declaration of Independence and the Constitution's deference to the practice of slaveholding. Gouverneur Morris, a firm supporter of the Constitution, told his fellow delegates that slavery was "a nefarious institution," a "curse of heaven," and a "sacrifice of every principle of right, of every impulse of humanity." Slavery existed only "in defiance of the most sacred laws of humanity." 2 *The Records of the Federal Constitutional Convention* 221-222 (M. Farrand ed. 1966).

Tench Coxe, a fervent supporter of the Constitution, criticized the Article I Section 9 slave import clause because it was "inconsistent with the dispositions and the duties of the people of America." Coxe, *An Examination of the Constitution* (1787), *reprinted in* 3 *The Founders' Constitution* 282 (P. Kurland and R. Lerner eds. 1987). Timothy Pickering viewed slavery as a "glaring [ ] inconsistency" with the principles of the Declaration of Independence. Letter from Timothy Pickering to Rufus King (Mar. 6, 1785), *reprinted in* 1 *id.* at 537.

One of America's first constitutional scholars, St. George Tucker, found it unconscionable that his country could "tolerate a practice incompatible" with equality, such toleration being "evidence of the weakness and inconsistency of human nature . . . ." S. Tucker, "A Dissertation on Slavery," in 2 *Blackstone's Commentaries* App. 31-32 (S. Tucker ed. 1803). He believed that a "state of slavery" was "perfectly irreconcilable" with the "principles of a democracy, which form the *basis* and *foundation* of our

Slavery is but one conspicuous example that reveals the inappropriateness of looking to eighteenth century practices to guide the interpretation of American fundamental law. The Founders frequently criticized the states for violating their own bills of rights. "In Virginia," Madison declared, "I have seen the bill of rights violated in every instance where it has been opposed to a popular current."[8]

Madison explicitly repudiated interpreting the Establishment Clause consistently with the practices of his generation. In rejecting chaplainships, he argued from principle, not practice. "The object of this establishment [of chaplains] is seducing; the motive to it is laudable. But is it not safer to adhere to a right p[r]inciple . . . ." J. Madison, *Madison's*

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government." *Id.* at 43 (emphasis in original).

Luther Martin, the Antifederalist Attorney General of Maryland, similarly condemned inconsistencies between Americans' principles and practices. "*[S]lavery* is *inconsistent* with the *genius* of *republicanism*, and has a tendency to *destroy* those *principles* on which it is *supported*, as it *lessens the sense* of the *equal rights* of mankind ...." Martin, "Genuine Information," in 15 *The Documentary History of the Ratification* 433 (J. Kaminski ed. 1984) (emphasis in original).

[8]11 *The Papers of James Madison* 297-98 (R. Rutland ed. 1977). Elbridge Gerry, the conservative Antifederalist from Massachusetts, acknowledged that his own state had "abused" the right to assemble that was guaranteed in the Constitution of 1780. 1 *Annals of Cong.* 732 (J. Gales ed. 1834). Aedanus Burke condemned the actions of the South Carolina legislature that were so "irregular" that "the very name of a democracy, or government of the people, now begins to be hateful and offensive." A. Burke, *Considerations on the Society or Order of the Cincinnati* 13 (1783). Although Georgia's Constitution of 1777 established procedures for amendments, the state legislature repeatedly ignored them during the 1780s. G. Wood, *The Creation of the American Republic* 274 (1969).



*'Detached Memoranda,'* 3 Wm. & Mary Q. 532, 559 (E. Fleet ed. 1948).

Thomas Jefferson similarly rejected the argument that the quasi-religious practices of the administration of President Washington were relevant for determining their constitutionality. Addressing a question similar to that now pending before this Court -- the constitutionality of state-endorsed prayers -- President Jefferson rejected Washington's example. Although "aware that the practice of my predecessors may be quoted,"[9] Jefferson rejected that precedent. "[C]ivil powers alone have been given to the President of the United States, [who possesses] no authority to direct the religious exercises of his constituents."[10] The Founders themselves thus rejected the very method of constitutional interpretation that the Solicitor General and Petitioners now advance in their name.

### B. Petitioners and the Solicitor General Distort History and Provide No Principled Basis for Their Selection of Particular Historical Examples.

#### 1. Petitioners and The Solicitor General Misconstrue the Founders' Practices.

The briefs of the Solicitor General and Petitioners exemplify the adage that law office history spawns neither good history nor good law.

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[9]Letter from Thomas Jefferson to Rev. Mr. Millar (Jan. 23, 1808), *reprinted in* 5 *The Writings of Thomas Jefferson* 237 (H. Washington ed. 1853).

[10]*Id.* at 237-238.

***The Oath Clause.*** In an effort to locate an endorsement of official religious exercises in the Constitution, the Solicitor General pinpoints the Oath Clause.[11] His brief describes the oath as a "devotional exercise[ ]," SG Br. at 7, that is "an inherently religious act," *id.*, constituting "a religious duty." *Id.* at 13.

This attempt to transform a constitutional oath into a "religious duty" of officeholders ignores the express language of the Religious Test Clause: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *See Torcaso v. Watkins*, 367 U.S. 488, 496 (1961). The Solicitor General thus offers the constitutional *prohibition* against a religious activity as if it were a constitutional *promotion* of just such an activity.[12]

***Official prayers.*** Petitioners and the Solicitor General observe that during the Founders' generation official prayers were

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[11] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Const. art. VI.

[12]The Solicitor General did not cite, for understandable reasons, the only two recorded comments about the Oath Clause made at the Constitutional Convention. "Mr. [James] Wilson said he was never fond of oaths, considering them as a left handed security only . . . ." Farrand, *supra* note 7, at 87. Representative Gorham of Massachusetts thought the "oath could *only* require fidelity to the existing Constitution." *Id.* at 88 (emphasis added). Neither recorded comment even remotely supports the Solicitor General's novel interpretation.



promoted by some of the early presidents, by John Jay, and by the legislature. But Petitioners and the Solicitor General apparently assume that simply because some official prayers were sanctioned in the eighteenth century, no further inquiry into the constitutionality of such prayers is necessary. Such an assumption ignores the controversy that such prayers generated and fails to account for inconsistent practices.

Jefferson and Madison -- whom petitioners themselves recommend as "the architects of our principles of religious liberty"[13] -- believed that official prayers were unconstitutional. In refusing to proclaim the setting aside of days of thanksgiving and prayer, President Jefferson cited the Establishment Clause and declared that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government."[14]

During the first three years of his own presidency, Madison continued Jefferson's practice of refusing to call for days of thanksgiving and prayer. Madison reversed his practice at the onset of the War of 1812, but ceased it as soon as the war ended.[15]

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[13]Pet. Br. at 14.

[14]Letter to Rev. Mr. Millar, *supra* note 9, at 236-37.

[15]Between July 1812, and March 1815, Madison issued four proclamations urging public thanksgiving to God. 1 *Messages and Papers of the Presidents* 513-561 (J. Richardson ed. 1901). Needless to say, a nation's wartime practices are not good sources for a deeper understanding of our civil liberties. *See, e.g., Korematsu* v. *United States*, 323 U.S. 214, 223 (1944) (the "military urgency of the situation demanded that all citizens of Japanese ancestry be segregated").

After retiring from the political pressures of the war and of public office, Madison decided that his own actions as president had violated the Establishment Clause. Referring to presidential encouragement of prayer, Madison declared that

> The practice if not strictly guarded [against] naturally terminates in a conformity to the creed of the majority and a single sect, if amounting to a majority.

*Detached Memoranda, supra*, at 561. Thus for Madison the practice of encouraging public prayers was not a respected precedent, but a Pandora's box that should be kept tightly shut. As Madison foresaw, the practice did not lead to tolerance generally, but to the shoring up of the beliefs of the majority. Madison similarly argued that the "establishment of the chaplainship to Cong[res]s is a palpable violation of equal rights, as well as Constitutional principles." *Id.* at 558. Madison thus rejected inferring any constitutional precedent from this early practice of Congress.

Petitioners assert that it is "noteworthy" that Chief Justice Jay held courtroom prayers while riding circuit in the 1790s. Pet. Br. at 29. The Solicitor General also observes that, under Jay's tutelage, "clergymen delivered prayers during circuit court on a regular basis . . . ." SG Br. at 11-12.

The Solicitor General and Petitioners could scarcely have selected a worse precedent to invoke than Jay's promotion of courtroom prayers. Despite his many admirable services to his country, Jay is not the person to whom we should turn to understand our religious liberties. Jay's religious intolerance was notorious. He sponsored the provision in the New York constitution that discriminated against Catholics by forbidding citizenship to immigrants who would not "abjure and renounce all



allegiance" to foreign ecclesiastical authority; *i.e*, the Pope.[16] Jay took an active role in promoting other forms of discrimination against Catholics.[17]

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[16]N.Y. Const. of 1777, art. XLII. *See* M. Williams, *The Shadow of the Pope* 43-44 (1932).

[17]Referring to John Jay's "deep-seated anti-Catholic prejudice," one historian reminds us that

> Jay persuaded the [New York Constitutional] Convention to bar ministers and priests from holding civil or military office and to withhold naturalization from persons who would not renounce 'all allegiance' to 'every foreign king, prince, potentate, and state, in all matters, ecclesiastical as well as civil.'

R. Morris, *John Jay: The Making of a Revolutionary* 15 (R. Morris ed. 1975). In New York Jay attempted, unsuccessfully, to deny Catholics all political rights, including the right to vote, unless they would "renounce and believe to be false and wicked the dangerous and damnable doctrine that the pope, or any earthly authority, has power to absolve men from sins . . . ." 1 A. Stokes, *Church and State in the United States* 405 (1950) (quoting Jay).

Unfortunately, Jay's anti-Catholicism was widely shared at the time of the founding.

> That vociferous propagandist, Sam Adams, assailed popery as 'the greatest of the evils to be feared by his fellow subjects.' In the campaign against the Quebec Act, John Adams recommended the use of the pulpit to strengthen feeling against the Catholics. Hamilton feared that an Inquisition might be erected in Canada. The Lees [of Virginia], Silas Deane, Drayton, Patrick Henry, were all suspicious of 'popery.' Except Franklin, Jefferson, and Washington, few of the colonial leaders failed to denounce Catholics more or less strongly at one time or another. The press was uniformly hostile.

Jay's insensitivity to religious liberty was underscored by his use of courtroom prayers. Jay announced his intention to follow the "custom in New England" of having a clergyman attend court, and Jay thereupon adopted the Massachusetts practice of beginning court with a prayer by a Protestant clergyman.[18]

But in adopting the Massachusetts custom, Jay chose to emulate the practice of a state that maintained an official establishment of religion until 1833 and did not ratify the Bill of Rights until 1939.[19] Moreover, the practice of offering prayers apparently was adopted in only three states, thus making it the *minority* practice under the early Republic.[20]

Essentially, therefore, the Solicitor General is asking that the Establishment Clause be interpreted by reference to:

-- a practice promulgated by a person who opposed religious liberty for Catholics;

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J. McSorley, *An Outline History of the Church by Centuries* 729 (1961).

[18]Letter from John Jay to Richard Law (Mar. 19, 1790), *reprinted in* 2 *Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1789-1800*, at 13-14 (M. Marcus ed. 1988). With only two exceptions, all of the prayers were offered by Congregationalists. *See id.* at 60, 106, 192, 317, 331, 412, 430 (Congregationalist prayers); *id.* at 105 (Baptist prayer); *id.* at 276 (Episcopalian prayer).

[19]*See* 2 W. McLoughlin, *New England Dissent* 1230-1244 (1971); 2 *The Bill of Rights: A Documentary History* 1172 (B. Schwartz ed. 1971).

[20]These three States were Massachusetts, *see* M. Marcus, *supra* note 18, at 60, 105, 106, 165, 232, 276, 317, 406, 496; New Hampshire, *see id.* at 192; and Rhode Island, *see id.* at 331, 412, 430, 475.



-- the eighteenth century "custom" of a state that maintained an official establishment of religion;

-- the eighteenth century "custom" of a state that had not ratified the First Amendment;

-- a minority practice of the Circuit Courts that was followed in only three states; and

-- a practice that *de facto* permitted only selected Protestant clergy to offer prayers in court.

**2. Petitioners and the Solicitor General Ignore the Objectionable Church-State Practices of the Founders' Generation.**

Many practices of the Founders' generation respecting religion, particularly those of the states, would be deeply objectionable if practiced today.[21]

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[21]In an understandable effort to distance themselves from state practices during the early Republic, some Justices of this Court have suggested that the practices of the state governments (as opposed to the federal government) can be ignored because state governments were not originally "subject to the constraints of the Establishment Clause." *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 670 n.7 (1989) (Kennedy, J. dissenting). Such a suggestion is unsound for several reasons:

*First*, it is inconsistent with well-established precedent in this Court. Virginia's enactment of the Bill for Religious Liberty was, for example, held to be "particularly relevant in the search for the First Amendment's meaning." *McGowan v. Maryland*, 366 U.S. 420, 437 (1961).

*Second*, it is at odds with the expressed view of President Jefferson when he analyzed the constitutionality of official prayers. Jefferson rejected the precedent of Washington's use of prayer, arguing that his predecessor had, "without due examination," wrongly followed "the example of *State* executives . . . ." Letter to Rev. Mr. Millar, *supra* note 9, at 237 (emphasis

***Several states restricted office-holding or the franchise to those who professed allegiance to Christianity or to Protestantism.*** South Carolina's constitution of 1778 allowed only members of the "Protestant religion" to be candidates for state offices and restricted the franchise to "every free white man . . . who acknowledges the being of a God, and believes in a future state of rewards and punishments . . . ."[22] Four other states restricted office-holding to Protestants.[23] Only modestly

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added). Similarly, John Jay sought to have the circuit he rode adopt the devotional practices of the state courts in which it was sitting. Letter to Richard Law, *supra* note 18, at 13.

*Third*, it ignores the political realities of the Republic's early years. Ten states restricted office-holding to Christians (and some states restricted office-holding to Protestants). *See* discussion *infra*. Given that national political leaders emerged from states that imposed religious requirements on office-holders and sometimes on voters, it was virtually inevitable that the electoral process would produce persons who took for granted official blessings for their religion.

[22] S.C. Const. of 1778, arts. III, XII, XIII.

[23]Georgia restricted the franchise to members of the "Protest[a]nt religion." Ga. Const. of 1777, art. VI. A similar provision was contained in Georgia's Constitution of 1789. Ga. Const. of 1789, art. I, § 18. Vermont required members of its House of Representatives to declare their belief

> in one God, the Creator and Governor of the Universe, the rewarder of the good and punisher of the wicked. And [to] acknowledge the scriptures of the Old and New Testament to be given by divine inspiration; and own and profess the Protestant religion.

Vt. Const. of 1786, ch. II, § XII. New Hampshire's constitution provided that "no person shall be capable of being elected a senator, who is not of the protestant religion." N.H. Const. of 1784, Part II, Senate. The same "protestant" requirement applied to Members of the New Hampshire House,



more tolerant, other states restricted office holding to Christians.[24]

***Several states explicitly limited their guarantees of religious rights to Christians or to Protestants.*** Many of the states whose constitutions contained clauses designed to ensure religious liberty nevertheless guaranteed that liberty only to Protestants or to Christians. The "religious liberty" clause in the Maryland constitution of 1776 protected only "persons [ ]

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*id.*, and to the state's chief executive officer. *Id.* New Hampshire did not remove these restrictions until 1877. M. Williams, *supra* note 16, at 48. New Jersey restricted office-holding to members of "any Protestant sect." N.J. Const. of 1776, art. XIX. This provision was retained until a new constitution was adopted in 1844. North Carolina forbade office-holding to any who would "deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments . . . ." N.C. Const. of 1776, art. XXXII. This article was not removed from the constitution until 1835. M. Williams, *supra* note 16, at 46.

[24]Delaware required state office-holders to "profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; [and in] the holy scriptures of the Old and New Testament to be given by divine inspiration." Del. Const. of 1776, art. 22. Maryland restricted the privilege of holding state offices to those who declared their "belief in the Christian religion." Md. Const. of 1776, A Declaration of Rights, &c., art. XXX; *id.*, The Constitution, art. LV. Massachusetts required office-holders to declare: "I believe the Christian religion, and have a firm persuasion of its truth . . . ." Mass. Const. of 1780, Part the Second, ch. 6, art. I. The Pennsylvania constitution of 1776 required the state's legislators to declare that they "do believe in one god, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked [and that they] do acknowledge the Scriptures of the Old and new Testament to be given by Divine inspiration." Penn. Const. of 1776, § 10. Pennsylvania's constitution of 1790 restricted officeholding to those "who acknowledge[ ] the being of a God and a future state of rewards and punishments . . . ." Penn. Const. of 1790, § 4.

professing the Christian religion."[25] Other states followed suit.[26]

***Three states sanctioned taxation for the support of churches.*** The Maryland legislature was specifically empowered by the state's 1776 constitution to "lay a general and equal tax, *for the support of the Christian religion* . . . ."[27] The Massachusetts constitution of 1780, in a provision that was not removed until 1833, empowered local communities to tax citizens for the support of the majority religion.[28] New Hampshire's 1784 constitution permitted taxation "for the support and maintenance of public protestant teachers of piety, religion and morality."[29]

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[25]Md. Const. of 1776, A Declaration of Rights, &c., art. XXXIII.

[26]Both Massachusetts and New Hampshire limited their constitutional protections to "every denomination of Christians . . . ." Mass. Const. of 1780, Part the First, art. III; N.H. Const. of 1784, Part I, art. VI. This restriction was retained in New Hampshire's constitution of 1792. N.H. Const. of 1792, Part First, art. VI. The New Jersey constitution provided that "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right." N.J. Const. of 1776, art. XIX. This provision was retained until a new constitution was adopted in 1844. In 1778, South Carolina limited its "equal religious and civil privileges" to "Christian Protestants." S.C. Const. of 1778, art. XXXVIII.

[27]Md. Const of 1776, A Declaration of Rights, &c., art. XXXIII (emphasis added).

[28]Mass. Const of 1780, Part the First, art. III.

[29]N.H. Const. of 1784, Part I, art. VI. New Hampshire's new constitution of 1792 retained the provision allowing taxation for the support of the majority religion. N.H. Const. of 1792, Part First, art. VI.



***Five states forbade the clergy from holding public office.*** In an eighteenth century practice that this Court recently declared, without dissent, to be unconstitutional, the states of Delaware, Georgia, New York, North Carolina, and South Carolina prohibited the clergy from holding state offices.[30] *See McDaniel v. Paty*, 435 U.S. 618, 629 (1978) ("however widely that view may have been held in the 18th century . . . including by enlightened statesmen" the practice is not acceptable today).

### 3. Petitioners and the Solicitor General offer no principled basis for selecting among historical practices.

Although Petitioners and the Solicitor General argue that the Constitution should be interpreted in light of the practices of the Founders, they offer no principled basis for distinguishing among the Founders' varying practices. They do not, of course, propose that we should follow Jefferson's refusal to promulgate days of thanksgiving and prayer. As Professor Wechsler observed, "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."

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[30]The Delaware constitution of 1776 prohibited any "clergyman or preacher of the gospel, of any denomination [from] holding any civil office in this State . . . ." Del. Const. of 1776, art. 29. The Georgia constitution of 1777 provided: "No clergyman of any denomination shall be allowed a seat in the legislature." Ga. Const. of 1777, art. LXII. Similarly, the Georgia constitution of 1789 provided: "No clergyman of any denomination shall be a member of the general assembly." Ga. Const. of 1789, art. I, § 18. The New York constitution of 1777 prohibited "ministers of the gospel" from holding "civil or military office." N.Y. Const. of 1777, art. XXXIX. *See also* N.C. Const. of 1776, Art. XXXI; S.C. Const. of 1778, Art. XXI. South Carolina continued its prohibition in its constitution of 1790. S.C. Const. of 1790, art. I, § 23.

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

Petitioners and the Solicitor General offer this Court no principled method of constitutional adjudication. They simply cite those practices that they believe foreshadowed the practice that they wish to see continued, and ignore those practices that are inconsistent with -- or embarrassing to -- their preferred outcome.

## II. THE PROPOSED "COERCION TEST" IS AN IMPROPER STANDARD FOR INTERPRETING THE ESTABLISHMENT CLAUSE.

The Solicitor General and Petioners urge the Court to use this case as an "opportunity to replace the *Lemon* test" and to adopt a minimal standard that will merely preclude the government from "coerc[ing] participation in religious activities." SG Br. at 6, 7.[31]

### A. Religious Coercion Was the Most *Flagrant* Harm Prohibited by the Establishment Clause, Not the *Exclusive* Harm.

In the congressional debates on the Establishment Clause, Daniel Carroll, a Catholic representative from Maryland, repudiated a minimalist "coercion" standard:

[31]Both the Solicitor General and Petitioners also would preclude the government from establishing an official religion. SG Br. at 7, 19; Pet. Br. at 24. No one, of course, advocates the establishment of an official religion, which suggests that this "second prong" is nugatory.



> [T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of [the] governmental hand.[32]

The Solicitor General seeks to transform the right that ought to be treated with "the gentlest touch" into one deserving of no protection greater than results from a prohibition against coercion. Thus he would reduce this right of "peculiar delicacy" to one that he himself compares to the rights of suspected felons undergoing police interrogation. *See* SG Br. at 22 n.21 (citing *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991) and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). No member of the First Congress proposed that coercion should be the standard. No member of Congress challenged Carroll's poignant reminder of the delicacy of these rights.

#### 1. Madison and Jefferson did not believe that coercion was a necessary element of an Establishment Clause violation.

The Solicitor General and Petitioners purport to derive their understanding of the "Founders' intent" by looking to the words of Jefferson and Madison. *See, e.g.*, SG Br. at 16, 18; Pet. Br. at 14. Although Petitioners correctly observe that "Madison and Jefferson were 'the architects of our principles of religious liberty,'" Pet. Br. at 14, and that during the First Congress debates on the Establishment Clause, Madison "played the leading role," Pet. Br. at 23, they wrongly infer that Madison and Jefferson believed that "government coercion of religious

[32]1 *Annals of Cong.*, *supra* note 8, at 730. The version of the Establishment Clause to which Carroll referred read: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*

conformity is a *necessary element* of an Establishment Clause violation." Pet. Br. at 14 (emphasis added).

Although Petitioners and the Solicitor General suggest that Madison believed that "coercion" was a necessary component of an establishment of religion, they were unable to quote any such statement to that effect. The reason for this resounding silence is obvious: Madison knew that governmental acts falling far short of "coercion" could create impermissible establishments. For Madison, "[r]eligion is wholly exempt from [the] cognizance [of government]." 8 *The Papers of James Madison*, *supra* note 8, at 300. *See also, id.* at 301 ("Religion be not within the cognizance of Civil Government"). Madison repudiated any notion that the "Civil Magistrate [is a] Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy." *Id.* It was not simply coercion, but the "danger of a direct mixture of Religion & civil Government" that needed to be avoided. *Detached Memoranda*, *supra*, at 556.

Madison also repeatedly warned against practices that might lead to impermissible actions. "[I]t is proper to take alarm *at the first experiment on our liberties*" and to look to "*the consequences in the principle.*" *8 The Papers of James Madison*, *supra* note 8, at 300. Madison reminded Americans that it was not just the ultimate harm that needed to be guarded against, but the incremental steps leading to that harm as well.[33]

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[33] The people of the U[nited] S[tates] owe their Independence & their liberty, to the wisdom of descrying in the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let them exert the same wisdom in watching ag[ain]st every evil lurking under plausible disguises, and growing up from small beginnings.

*Detached Memoranda*, *supra*, at 557-58.



Petitioners and the Solicitor General also err in suggesting that Jefferson also believed that coercion was a necessary component of an establishment of religion. Pet. Br. 33; SG Br. at 7, 18. To the contrary, Jefferson believed that the Establishment Clause was violated even when government "indirectly" recommends that prayers be offered. The President rejected a constituent's suggestion that he

> should *recommend*, not prescribe a day of fasting and prayer. That is, that I should *indirectly* assume to the United States an authority over religious exercises, which the Constitution has directly precluded them from.

Letter to Rev. Mr. Millar, *supra* note 9, at 237.

Far from believing that the Establishment Clause merely prohibited coercion, Jefferson believed that it would be unconstitutional for him even to *"recommend"* the offering of prayers. The reason, Jefferson asserted, was that the practice divides the citizenry and diminishes the status of the minorities.

> It must be meant, too, that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription, perhaps in public opinion.

*Id.* (emphasis added). The harm resulting from official prayers was not merely the possible coercion of fines and imprisonments, but the humiliation of dissenters in the eyes of public opinion. The degree of force was not the relevant standard for determining constitutionality.

Madison and Jefferson never said that coercion was the *only* wrong prohibited by the Establishment Clause. The suggestions of the Solicitor General and Petitioners to the contrary are utterly inconsistent with the beliefs of these Founders.

### 2. The proffered "coercion test" ignores the plain language of the Establishment Clause.

Although the Solicitor General professes to adhere to the "plain meaning" of the constitutional text, SG Br. at 15, in reality he is asking this Court to re-write the Establishment Clause. He seeks to transform the constitutional requirement that there be "no law respecting an establishment of religion" into a new formulation providing that "any law respecting an establishment of religion is permissible provided that it does not coerce."[34] Such a reformulation of the Establishment Clause would essentially strike the term "*no law respecting*" and replace it with "coercion."

The Establishment Clause, however, does not merely prohibit an establishment of religion. Madison believed that "[t]he Constitution of the U.S. forbids *everything like an establishment of a national religion.*" *Detached Memoranda, supra*, at 558 (emphasis added).

It is indeed a strange form of constitutional interpretation that excises words that expand the scope of the constitutional protection and substitutes a restrictive term in their place. Such

[34]*See, e.g.*, SG Br. at 7 ("coercion is the touchstone of an Establishment Clause violation"); *id.* at 18 (Founders believed "the essence of an establishment of religion was some form of legal coercion"). Again, we are assuming that everyone agrees that an "official establishment of a national church" prohibited. *See supra* note 31.



disregard for language comports neither with the intent of the Founders, nor with the respect that should be accorded to the Founders' choice of words.

### B. "Coercion" Is a Flawed Standard for Interpreting the Establishment Clause.

After decrying the "confusion," "division," and "demonstrated shortcomings of the *Lemon* test,"[35] SG Br. at 7, 24, the Solicitor General proposes that it be replaced by a new "coercion" test. He suggests that the interpretation of a coercion standard would not need to be developed *ab initio* because "coercion" has previously been "raised in many areas of constitutional law." SG Br. at 22 n.21 (citing *Arizona v. Fulminante*, 111 S.Ct. 1246 and *Schneckloth v. Bustamonte*, 412 U.S. 218). Even if we ignore the extraordinary implications of the Solicitor General's analogizing religious rights to the rights of suspected felons undergoing police searches and interrogations, the fractured opinions in the very "coercion" cases he cites do not suggest that this "coercion test" is likely to lead us away from "confusion" and "division."[36]

The cryptic guidelines offered for applying the "coercion test" presage neither coherence nor respect for our constitutional tradition. Curiously, after denouncing the supposed incoherence of *Lemon*, neither the Solicitor General nor Petitioners define "coercion," the word that they would use to revise the First Amendment. They also ignore the difficult issue at the heart of this case: predication of governmental benefits on participation at religious events. It can of course always be argued that no one

[35]*Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

[36]Five separate opinions were filed in *Schneckloth* and four were filed in *Fulminante*.

is forced to accept benefits -- such as a high school diploma -- and thus no coercion has occurred. Thus does the "first experiment with our liberties" lead to the deterioration of a constitutional standard. Although the briefs of the Solicitor General and Petitioners do not explain the meaning of this new constitutional term, some of their discussion suggests a standard that completely ignores our constitutional tradition.

The Solicitor General advocates an Establishment Clause analysis of governmentally-sponsored religious activities that "shifts the focus away from an evaluation of the religious practice to an assessment of the autonomy of the observers of the practice." SG Br. at 22. The flaws of such a test, which focuses not on the government's action but on the circumstances of the individual, are readily exposed by hypothetical examples.

Suppose that the Utah State legislature, the majority of whose members are Mormon, passed a law providing that the following "official belief" would be read at every public high school graduation, court hearing, and meeting of the state legislature:

> ~~We,~~ the citizens of Utah, believe that Joseph Smith was an inspired prophet of God; We believe that the God of this world is a physical being who became a God only after living as a person on another world; We believe that there are other Gods ruling over other worlds; We believe that God was the literal physical father of Jesus Christ and that Mary was the literal physical mother of Jesus Christ; We believe that the Book of Mormon is the inspired Word of God and is superior to any other book including the Bible.



According to the Solicitor General's test, Utah's promulgation of such an "official belief" would be constitutional, provided that no person is "coerced" into attending an event where the statement is read. Religious majorities would be free to promulgate official beliefs and practices because the Solicitor General "shifts the focus away from an evaluation of the religious practice to an assessment of the autonomy of the observers of the practice." SG Br. at 22.[37]

Or suppose that the State of Rhode Island decides that all state buildings will display a crucifix and a photograph of the Pope. Once again the Solicitor General evidently would not look to the character of the religious practice, but only to whether people are "coerced" into visiting the buildings.

The Solicitor General and Petitioners would transform coercion, which heretofore has been a *sufficient* condition of an Establishment Clause violation, into a *necessary* condition. They would ignore or overrule this Court's proper holding that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 786 (1973). *See also Abington v. Schempp*, 374 U.S. 203, 223 (1963).

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[37]Even if this shift in focus were appropriate, this Court has acknowledged that school children are not sufficiently autonomous so as to be immune from "religious indoctrination." *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983). *See also* SG Br. at 26 ("We recognize that this Court's Establishment Clause decisions evince a special solicitude for young children").

## III. RABBI GUTTERMAN'S PRAYER, LIKE ALL RELIGIOUS EXERCISES SPONSORED BY PUBLIC SCHOOLS, VIOLATED THE ESTABLISHMENT CLAUSE.

Almost twenty-five years before its decision in *Lemon*, this Court struck down a public school program that permitted members of the clergy to spend a few minutes each week at public schools conducting religious activities. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). Despite the fact that the challenged program was non-sectarian, was strictly voluntary, and cost the state no additional expense, this Court found that the program fell "squarely under the ban of the First Amendment." *Id.* at 210.

Mr. Justice Frankfurter, writing separately in support of the *McCollum* decision, faced the issues that were as important in that case as they are here today. The practice under review, he wrote,

> presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. *That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain.* . . . [The effects of such programs] are precisely the consequences against which the Constitution was directed . . . .

*Id.* at 227-28 (Frankfurter, J.) (emphasis added).



This Court has in fact consistently struck down all religious exercises sponsored by public schools. Against only one dissenting opinion, this Court held that school-sponsored Bible reading was a "violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion." *Abington School District v. Schempp*, 374 U.S. at 225. The *Schempp* Court, in a decision handed down ten years before *Lemon*, similarly repudiated the argument now advanced by the Solicitor General, and denounced the practice of letting a majority "use the machinery of the State to practice its beliefs." *Id.* at 202.

This Court also decided prior to *Lemon*, and without dissent, that the State may not proscribe teaching certain subjects because they conflict with religious doctrines. *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). A decade before *Lemon*, and against only one dissent, this Court also struck down a state-sponsored prayer that closely resembled the prayer offered by Rabbi Gutterman. *Engel v. Vitale*, 370 U.S. 421 (1962).[38] *See also Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating statute authorizing moment of silence at public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (striking down statute requiring posting of Ten Commandments at public schools).

Recently, in upholding the right of students to join together in prayer, this Court emphasized that the *school was not the sponsor* of the devotional exercises. *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990). The Court based the

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[38]The unconstitutional prayer in *Engel*: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. Rabbi Gutterman's prayer: "God of the Free, Hope of the Brave. . . . May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled." Joint Appendix at 22.

constitutionality of the Equal Access Act, 98 Stat. 1302, 20 U.S.C. §§ 4071-4074, in part on the fact that "[b]ecause the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion." 110 S. Ct. at 2371. The *Mergens* Court also underscored the importance of the fact that it was the students who initiated the devotional speech. 110 S. Ct. at 2372. Here the students did not initiate the exercises. It was the school that decided to sponsor devotional exercises and to select members of the clergy to propagate that religious practice.

Petitioners and the Solicitor General are not bemoaning the difficulties of applying the *Lemon* test as much as they are repudiating a half-century of consistent constitutional adjudication that has prohibited public school sponsorship of religious activities.

Ironically, in addition to dismissing this half-century of decisions, the Petitioners and Solicitor General fail even to come to terms with the elements of coercion that are to be found in the case now before this Court. Petitioners and the Solicitor General argue that there was no coercion -- a term that they do not define -- in the school-sponsored devotional exercises in Providence and conclude that the prayers therefore pass constitutional muster. The Solicitor General asks only whether students were compelled to attend the graduation ceremony. Finding that they were not, he concludes that there was no coercion. SG Br. at 25; Pet. Br. at 36.

Having failed to find coercion where he looked for it, the Solicitor General then ignores state control over the devotional exercises that he champions:



-- the public school directed that a portion of a public forum will be set aside exclusively for devotional worship;

-- the public school decided that only clergy would offer prayers;

-- the public school decided which members of the clergy would be permitted to pray;

-- the public school determined the form of prayer that was acceptable; and the most clearly coercive;

-- the public school determined that all students who wished to attend graduation must attend the ceremony containing the officially-sponsored devotional worship.

As Justice Frankfurter observed, such "voluntary" programs contain "elements of inherent pressure by the school system" and "are precisely the consequences against which the Constitution was directed . . . ." *McCollum v. Board of Education*, 333 U.S. at 227-28.

Thus, even after he aimed at the wrong target, the Solicitor General missed his mark.

## CONCLUSION

In *McDaniel v. Paty*, 435 U.S. 618 (1978), this Court properly did not hesitate to strike down a modern vestige of a common eighteenth-century practice that violated the religion clauses. This Court looked to the underlying principles of those clauses, not to the "Founders' practiees."

During the past forty-five years this Court has consistently struck down public school sponsorship of devotional activities. This Court has never sanctioned public schools sponsoring religious exercises. It should not begin to do so now.

Respectfully submitted,

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Aspira of New York, Inc.
Association of Reform Rabbis of New York City and Vicinity
Citizens Union of the City of New York
City Club of New York
Community Church of New York, Social Action Committee
Community Service Society
Council of Churches of the City of New York
Council of Supervisors and Administrators
Episcopal Diocese of L.I., Committee on Social Concerns and Peace
Humanist Society of Metropolitan New York, Inc.
Jewish War Veterans, Department of New York
League for Industrial Democracy, New York City Chapter
National Council of Jewish Women, New York Section
National Service Conference of the American Ethical Union
New York Jewish Labor Committee
New York Society for Ethical Culture
New York State Congress of Parents and Teachers
Rochester Chapter of Americans United for Separation of Church and State
Public Education Association
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